

REMARKS

Claims 1-21 are pending in this application. Attached hereto is a complete listing of all claims in the application, with their current status listed parenthetically. By this Response, no claims have been amended, cancelled or withdrawn.

Rejections Under 35 U.S.C. § 103

Pending claims 1-21 stand rejected as unpatentable under 35 U.S.C. § 103(a) over U.S. Patent 6,492,897 ("Mowery") in view of published U.S. patent application 2004/0142663 ("Roberts"). Applicant respectfully traverses this rejection.

Applicant respectfully traverses this rejection because the Roberts reference cannot be considered as prior art for making a *prima facie* case of unpatentability. Specifically, the Roberts reference indicates a file date of July 22, 2003. Applicant's application claims priority to an application filed June 21, 2002 (serial no. 10/177,313).

Applicant's priority date is prior to the Roberts filing date. However, Roberts claims priority to several provisional applications, listed below.

"Before answering Graham's 'content' inquiry, it must be known whether a patent or publication is in the prior art under 35 U.S.C. § 102" (M.P.E.P. 2141.01).

"However, the subject matter of an abandoned application, including both provisional and nonprovisional applications, referred to in a prior art U.S. patent may be relied on in a 35 U.S.C. § 102(e) rejection based on that patent if the disclosure of the abandoned application is actually included or incorporated by reference in the patent" (M.P.E.P. 2127) [emphasis added].

Thus, Robert's filing date of July 22, 2003 eliminates it as a 35 U.S.C. § 102(e) reference, but one of the provisional applications may be considered a reference, as shown in the table below:

Filing Date	Serial Number	Prior Art Status
July 22, 2003 (Roberts published application)	10/623,798	Not prior art
February 19, 2003 (Roberts parent)	10/367,834	Not prior art
July 26, 2002 (provisional)	60/398,596	Not prior art
July 22, 2002 (provisional)	60/397,104	Not prior art
July 22, 2002 (provisional)	60/397,105	Not prior art
February 20, 2002 (provisional)	60/357,638	Prior art

The subject matter of the February 20, 2002, provisional application may support a 35 U.S.C. § 102(e) rejection if the subject matter actually can support a 35 U.S.C. § 102(e) rejection, and if it is actually included or incorporated by reference in the patent. In this case, Roberts makes a priority claim to the February 20, 2002 provisional application and also incorporates it by reference. (page 1, para. 0001)

Therefore, Roberts is not prior art, and Applicant respectfully requests a copy of the February 20, 2002 provisional application, so that Applicant may determine if any its disclosure is actually included in Roberts. Moreover, Applicant requests Roberts's prosecution history (if any), to determine if any portion of the February 20, 2002, provisional application was cancelled. "Portions of the patent application which were cancelled are not part of the patent or application publication and thus cannot be relied on in a 35 U.S.C. § 102(e) rejection over the issued patent or application publication" (M.P.E.P. 2136.02).

In view of the above discussion, Applicant respectfully submits that the Section 103 rejections of claims 1-21 have been traversed.


Conclusion

Applicant believes that this Response has addressed all items in the Office Action and now places the application in condition for allowance. Accordingly, favorable reconsideration and allowance of claims 1-21 at an early date is solicited. Enclosed with this Response is the fee for a three-month extension of time for a small entity. Should any issues remain unresolved, the Examiner is invited to telephone the undersigned.

Respectfully submitted,

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Date



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